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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ERNESTINE GRANT, on behalf of herself individually and on behalf of all similarly situated persons,

Plaintiff,

v. 16 Civ. 3175 (PKC)

THE NEW YORK TIMES COMPANY, *et al.*,

Oral Argument

Defendants.

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New York, N.Y.
October 18, 2018
2:00 p.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

WIGDOR LLP
Attorneys for Plaintiff
BY: LAWRENCE M. PEARSON
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PROSKAUER ROSE LLP
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BY: MARK W. BATTEN
LARISSA R. BOZ
GREGORY I. RASIN

(Case called)

MR. PEARSON: Good afternoon, your Honor. Larry Pearson of Wigdor LLP, here with my colleague Hilary Orzick, for the plaintiffs.

THE COURT: All right. Good to meet you, Mr. Pearson.

MR. BATTEN: Good afternoon, your Honor. Mark Batten, with Larissa Boz and Greg Rasin, for the defendants.

THE COURT: All right. Good to see you all.

I guess thinking about this there are several issues in my mind. One is, has the plaintiff had a full and fair opportunity to conduct discovery on 23(a)(1), whether the class is so numerous as to make joinder impracticable?

No. 2, what does that discovery show?

Of course, these questions are asked both as to a race class and an age class.

And No. 3 is what, if any, is the proper procedural vehicle to dispose of the issue?

Let's focus for the moment on issue No. 1, and since the defendants are the movants, I'll give them an opportunity to address the question of what kind of discovery the plaintiff has had with regard to 23(a)(1).

MR. BATTEN: Thank you, your Honor.

I'll just address that first question.

THE COURT: Yes.

MR. BATTEN: The plaintiffs have the identities of all

of the individuals who are potentially in the class.

THE COURT: What does that mean? What has your client done in discovery that leads you to that as the conclusion?

MR. BATTEN: There has been production of about 4,000 documents so far, your Honor, which include complete details -- names, positions, demographic details, compensation details -- about all of the account managers who worked in the advertising department during the relevant period.

THE COURT: And what is that? Is that personnel files, or what have you given them?

MR. BATTEN: It's spreadsheets of information, primarily, supplemented with, as relevant to this motion, copies of release documents that, as you know, a number of the individuals have signed; copies of buyout documents that were made available to individuals so that they could choose whether they wanted to take a buyout or not. They have that information as well.

To answer the question about whether the plaintiffs have had enough discovery, the answer may be separate from the race class versus the age class, because with respect to the proposed race class, there simply have only been ten African-American account managers at The New York Times Company during the relevant period, regardless of how you count; that is to say, whether you count the people who have signed the releases or not, the number is ten. And if we exclude from

this class the individuals who have signed releases, the number is six. We would say that with respect to the race class, there is no discovery to be done, because whatever you do, whatever more information you find out, there are never going to be more than ten potential class members.

THE COURT: And the six includes the two plaintiffs.

MR. BATTEN: Correct, so only four others who are not before the Court, your Honor, and who have not signed releases.

With respect to the age class, there is, maybe, a little bit more to talk about because the release issue becomes more important in the sense that if you include in the class the people who have signed releases, the number is 59. Again, there's no more discovery necessary about that number. Plaintiffs have all the information about those people, all their details, 35 of whom have signed releases, and those documents have been produced, leaving a potential class of 24.

THE COURT: Again, 59 account managers in the relevant time period who are above the age of 40.

MR. BATTEN: Correct.

THE COURT: Right. And what is the number who have signed releases?

MR. BATTEN: 35, your Honor.

THE COURT: All right.

MR. BATTEN: Leaving 24 who have not, 14 of whom are current employees, 10 of whom have left.

THE COURT: All right.

MR. BATTEN: And again, those figures include the two named plaintiffs as well, obviously.

THE COURT: All right.

Let me hear from Mr. Pearson on the question of whether you have had full and fair discovery with regard to numerosity relating to the race class, and then the age class.

MR. PEARSON: Certainly, your Honor.

Our view is that we have not had a full and fair opportunity, your Honor. Numerosity, the number of people in these classes, is a factor. It is an important factor. It's not the only factor, but to address the Court's question directly, even with regard to 23(a)(1), even with regard to numerosity, there has not been full and fair discovery.

I'm glad that the releases were mentioned as a factor.

THE COURT: No. Let's talk about the race class first before we get to the age class.

MR. PEARSON: OK.

THE COURT: Go ahead.

MR. PEARSON: Certainly.

With regard to the race class, there were only, there are about four people, we believe it's four people, in the race class who signed releases. Right? There are six who have not signed releases. So the race class -- and there is overlap between the race and age class, so the race class would

increase to ten.

The problem is, the reason that the releases become very, very relevant, even with only six people, even with only ten people in the race class, we haven't had an opportunity to take discovery on the practices surrounding not just the releases, not just these supposedly voluntary buyouts, but retention trends. Right?

We do have data on a few years, the employees who were in the advertising division and in the account manager position, but we have not had an opportunity -- discovery has been on hold. We have not had an opportunity to do a statistical analysis of retention trends, of people coming in. We have not had a chance to talk with the witnesses, depose the defense witness, depose the management of the advertising division about their preferences, their hiring preferences, which is central to our allegation.

THE COURT: If you had a single-plaintiff case or a two-plaintiff case, there is, I don't know whether the right term is "a certain amount" or "quite a bit" of that that is appropriately within the scope of discovery you might conduct to prove your case. That's not in dispute here.

The question that I'm focusing on at the moment is 23(a)(1), and the funny part about 23(a)(1) is numbers are numbers, and with regard to the race class, if there are four who signed releases and six who didn't sign releases, at least

as to the race class, the number still becomes ten, unless there's some reason to believe it should be eleven or twelve or some other number. But unless there's some basis for that ten to change, it's ten. And we can talk about what that means. We can talk about your argument with regard to injunctive relief. We can talk about a lot of different things, but ten, it sounds like, remains ten, at max.

MR. PEARSON: Likely it will remain that, your Honor. I, frankly, don't know where the data came from, whether it's self-ID forms, whether they did a visual survey. I don't know that. I'm not calling into question the veracity of the data.

THE COURT: Right.

MR. PEARSON: But just to underscore the point as to how relatively little discovery we've received here, we really haven't received much, if almost any, electronic discovery, for instance, despite the fact that the parties had committed to doing that. I don't know where the data came from. Right? So that in itself is something that, as an attorney in a litigation, I'd like to know, what the provenance of this data is, although, again, I'm not calling it into question. Right? But the Court is correct that as of right now, I don't have a basis to say that ten may change.

THE COURT: Right.

MR. PEARSON: However, we certainly would want the opportunity to be heard about the idea that future employees

should also be considered under declaratory injunctive relief, and things like that, as to whether or not the class mechanism is the correct one here.

THE COURT: Right.

Now talk to me about age.

MR. PEARSON: Yes.

With respect to age, certainly with 24 people, we believe that, particularly with the declaratory injunctive relief, the current employee factor, that number would support class. In addition to those 24, you do have these 35 people who signed releases, and we certainly would want to take discovery.

THE COURT: If it's 24, you're in what is colloquially known as the gray area, 21 to 40.

MR. PEARSON: I think that's fair, your Honor, under the case law.

THE COURT: Right.

MR. PEARSON: With respect to the other people who signed releases and, frankly, the practice in general -- and there are other things, obviously, that we point to -- discovery certainly should be taken, because it seems that those buyouts disproportionately affected people who were older.

I'll give an example. The buyout package that was received by Ms. Grant, one of the individual plaintiffs, came

with a list of the people who were eligible and the people who were not eligible for one of these buyout packages at that time, and that listed the ages of the people and whether or not they were eligible.

If you look at the employees who were on that list, 31 of the 165 people under 40 were eligible. That's about 19 percent. The higher you go in age, the larger and larger that percentage gets, and it's not as though you needed to have 20 years of tenure with the Times in order to be eligible for one of these.

For instance, the over-40 cohort, 8 out of 22 were eligible, so you go from 19 to 36; over 50, 9 out of 17, so 53 percent; over 60, 5 out of 7, 71 percent.

THE COURT: Do you know what the criteria was for offering the buyout?

MR. PEARSON: I believe, from reading it recently, in preparation for the conference, a few days ago, you needed at least a year, and there were maybe one or two other factors, with the company.

But the fact is, was it that mechanical, or did they pick and choose? We don't know, your Honor.

THE COURT: All right. That's an interesting point. Let me hear from defense counsel.

I think Mr. Pearson said it very well. Did the employer pick and choose, or was it mechanical?

MR. BATTEN: The answer is that it was mechanical, and the plaintiffs know it was mechanical from the documents that have already been produced. The very buyout document that Mr. Pearson was just referring to says, page 1135 of the exhibit, every nonunion and union U.S.-based sales employee in the advertising department, as long as they had a year of service, was offered the buyout.

To make it more specific, let's recall that the complaint seeks to certify a class of account managers, a specific job title within the advertising department. A lot of the people on this list who were not offered the buyout are not account managers. If you look at the list, it has the titles in there as well. Every single account manager, except for those newly hired, without a year of service, was offered the buyout.

THE COURT: What if you had a new hire who was over 40 but had less than a year; would they have been eligible for the buyout?

MR. BATTEN: No, your Honor, and the document says that.

THE COURT: All right.

MR. BATTEN: The material that the plaintiffs need in order to make this assessment has already been produced in discovery. All of the buyouts that have been offered have been offered that way; that is, to the entire advertising

department. And there is no basis on which to conclude that anybody was coerced into accepting a voluntary buyout. Remember that these are voluntary buyouts, so even if the employer, hypothetically, disproportionately offered them to older employees, that's providing a benefit to an older employee, not a burden.

The question would have to be, for numerosity purposes, was someone coerced? And among other problems with that as a basis for numerosity, it's a very individualized issue. Even if we were beyond discovery -- all discovery -- and the Court was considering a full-blown motion for class certification, we'd still be talking about numerosity, and the question would be, can this case be decided on a class basis or not? The plaintiffs would be saying certification is going to depend on many hearings about each individual in the class; were they coerced into signing the release or not? That's not a class.

THE COURT: That's also not numerosity.

MR. BATTEN: Well, it is in the sense that you have to know who's in the class to decide whether it can be certified or not. There's an ascertainability requirement that goes along with numerosity, and when we're trying to figure out who's in and who's out, if you have to have a trial on the voluntariness of the release, that's not a class.

THE COURT: Let me ask a question, out of ignorance.

Mr. Pearson may be the better person to ask, but since you're standing up, I'll ask you and then I'll ask Mr. Pearson.

When is the offering of a buyout to an older worker actionable, and are the allegations of this complaint broad enough to pick that up as an actionable claim?

MR. BATTEN: No, your Honor.

If there was an involuntary layoff disproportionately, there would be a claim for that, but a voluntary buyout is an offer that can be accepted or declined; We're going to give you this much in severance if you agree to leave.

THE COURT: Is there any case law on that? Has anybody ever tried to, that you know of, argue that that's discriminatory? I'm asking this out of total ignorance. Could an employer say I'm offering voluntary buyouts only to employees who have reached their 40th birthday and not to those who haven't?

MR. BATTEN: That actually happens all the time, your Honor, because a lot of times the reason the employer wants to reduce its workforce is to cut expenses. And just because of tenure and raises and so forth, sometimes the older employees are the more expensive because their compensation is higher. It's not at all uncommon to say, for example, you have to have a combination of years of service and age that reach some number, X, in order to be eligible. It happens all the time.

THE COURT: All right. Let me give Mr. Pearson an

opportunity to explain his position further with regard to the buyout.

The argument is proffered that these are people who voluntarily decided to take the buyout; that it was mechanically available to anyone with one year or more service; that among the account managers, the numbers are what they are; and that those who accepted the buyout issued releases in connection therewith.

MR. PEARSON: Yes, your Honor.

This wouldn't require a trial on voluntariness with respect to each person. What the case is about, what the allegations concern, what the class discovery would largely focus on, is whether or not this had a disproportionate impact on the older employees. And there is some anecdotal evidence that we've learned of, through our clients, that people were brought in and told, You know, you really ought to do this.

THE COURT: But hang on. Is there anything unlawful in designing a buyout that will have a disproportionate impact on older workers, because it goes for workers with higher salaries, and that necessarily impacts disproportionately older workers? Is that unlawful to do?

MR. PEARSON: It depends on the facts, your Honor. It could be, particularly if that is part of the intent, and if there is an effect in the workplace that if somebody turns down such a package, their prospects -- their work environment --

are going to get worse. Right? So yes, if the motivation is there, if the disparate impact is pronounced enough, then there really ought to be a different mechanism that's used.

I agree that employers can be stuck between a rock and a hard place if they're conducting a reduction in force or something like that and they're trying to cut payroll and there may be some correlation, but that is why these decisions need to be made deliberately, and mechanisms shouldn't be used that will have either this kind of effect or that conveniently achieve this kind of effect when it's the effect that it desired.

There are allegations in this case, your Honor, that there was an express preference for fresh faces, for a workforce that is younger and more affluent-seeming. This deliberate policy very much seems to be a part of that, and it would be ironic.

THE COURT: What deliberate policy?

MR. PEARSON: A policy of issuing buyouts.

THE COURT: But this is not a case where the buyout was targeted to any one group. It's a buyout which anyone employed more than one year can take.

MR. PEARSON: Correct, your Honor.

THE COURT: That's what's proffered here.

MR. PEARSON: And a buyout is going to be -- and I haven't crunched the numbers on the money, how the money jumps

after so many years of tenure, that sort of thing. I don't have mastery of all of that, but logic and common sense says that someone isn't generally going to take a buyout akin to a retirement package or moving on after they've been with an employer for a year. It's typically going to be people who have been around for a longer amount of time.

THE COURT: Because they'll get more under the package.

MR. PEARSON: They'll get more under the package, it's true.

THE COURT: Why is that a bad thing, an unlawful thing, a rude thing, something that should be discouraged rather than encouraged?

MR. PEARSON: It shouldn't be discouraged in every case. It's a mechanism that lots of employers use, obviously.

THE COURT: Is it a good thing or a bad thing for employees?

MR. PEARSON: It completely depends on the situation, but where an employee is brought in and told, Look, one of you longer tenured employees needs to do this, or where someone gets the feeling that after she turns it down, because she wants to keep working, her opportunities, her perks, all these things continue to atrophy, where you have retaliation, where you have a workforce that is increasingly hostile to older workers, it can be a bad thing, because it can feel, even if it

isn't expressly said -- and again, we don't have the discovery on whether or not it was expressly said to people or suggested heavily to people. We haven't had depositions. We don't have emails saying, Hey, have you followed up with Marjorie on her buyout or followed up with Ernestine on her buyout? We don't have that.

Where that happens, then it is a bad thing. It is something that is otherwise at least possibly neutral that is being used to achieve an unlawful end. And we have not had the opportunity to do that. That not only goes to numerosity, but it goes to the importance of the declaratory injunctive relief, which whether we have 6 people or 24 people or 59 people, is something that is very, very appropriate for class discovery and class treatment.

THE COURT: Let me ask you this. Can't you get an injunction in a single-plaintiff case?

MR. PEARSON: You can achieve injunctive relief. However, the discovery, other things are not the same.

THE COURT: All right.

MR. PEARSON: It's not the same, your Honor.

THE COURT: I understand, but just as a legal proposition, you're not foreclosed from seeking declaratory injunctive relief.

MR. PEARSON: No, not entirely.

THE COURT: All right.

MR. PEARSON: Sure.

THE COURT: Let me raise the following:

The defendants have styled their motion as a motion under 12(f).

Rule 23 specifically provides that the Court may enter an order, 23(d)(1)(D), requiring that the pleadings be amended to eliminate allegations about representation of absent persons and let the action proceed accordingly.

Rule 16 gives the Court broad authority to formulate a plan to simplify the issues, eliminate frivolous claims or defenses, and adopt procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, or otherwise facilitate in other ways the just, speedy and inexpensive disposition of the action.

I understand the plaintiff's argument that this is not such a case, but in a case in which a plaintiff has had discovery on numerosity and cannot make out numerosity but has not had discovery on other issues, what is the proper procedural vehicle for disposing of that issue up front, or is it the plaintiff's position that there is no such vehicle?

I'll hear from the defendants first.

MR. BATTEN: Thank you, your Honor.

It is titled a motion to strike, and you do see that phrase more commonly in a motion that comes right after the

pleadings are filed, so maybe 23(d)(1)(D) is the more appropriate thing here. We didn't want to signal by invoking Rule 23 that we intended this to be the plaintiffs' only shot at class certification because we clearly were only addressing the one point, numerosity.

THE COURT: Let me make sure I'm understanding you. What you're proposing is exactly that, that this is the plaintiff's one and only shot at class certification.

MR. BATTEN: Because they fail at the threshold, and this 23(a)(1) requirement has to be satisfied before you even get to the other things.

THE COURT: All right.

MR. BATTEN: Yes. I don't disagree at all with what your Honor said, but it may be that it's more proper, because we've had some discovery and it's not the kind of motion that ordinarily comes under Rule 12; it may be more appropriately characterized as a 23(d)(1)(D) motion in terms of title with respect to the procedure.

THE COURT: All right.

MR. BATTEN: If I can return, though, briefly to the points my brother was just making, this is not a disparate impact case. There is no disparate impact claim in the complaint, and despite several amendments, there never has been one.

The allegation here is the disparate treatment, and

while there is an injunction element to the relief sought, the real essence of the claim and the reason it's a class claim is because they're after damages under 23(b)(3). As your Honor said, there is no need for a class claim in order to get injunctive relief.

In the case law, in every case where the numerosity standard is relaxed or numerosity is found to exist with a smaller number of class members on the basis of injunctive relief, it's because an injunction was the only relief sought and the class members were vulnerable populations of welfare recipients or the unemployed, and so forth.

This is a case that is fundamentally about damages. It's a case in which plaintiffs want to certify a class primarily to obtain damages for those individuals, and the injunctive relief, respectfully, is the tail on this dog. The essence here is numerosity ought to be applied full throttle here, because this is the kind of case where joinder is entirely practicable.

Recall that the only purpose of the numerosity requirement in the first place is, Can the plaintiffs who make up the class be joined or not? And this is a group of relatively sophisticated, relatively well-paid individuals, all of whom are either living in Manhattan or recently were living in Manhattan, could easily be joined to this case, even if it's 59 rather than 24.

THE COURT: You're not suggesting that Rule 23 does not apply to residents of Manhattan, are you?

MR. BATTEN: Certainly not.

THE COURT: OK.

MR. BATTEN: No, I don't begin to suggest that, but I do suggest that where the number is small enough and the people are located closely enough, and they have a relative degree of resources and sophistication that they could join the case themselves if they chose to, which nobody has chosen to do over the last two years, the class treatment -- and that is the adjudication of their claims without them being present in the courtroom -- is not appropriate.

THE COURT: Thank you.

MR. BATTEN: Thank you.

THE COURT: Let me hear from Mr. Pearson.

MR. PEARSON: Your Honor, certainly because somebody has a job that pays them high five figures or six figures doesn't take them out of the protection or mean they can't avail themselves of Rule 23. You have classes of lawyers and other sophisticated individuals.

THE COURT: Maybe you should say lawyers and sophisticated individuals.

MR. PEARSON: Certainly.

THE COURT: Strike the "other."

Go ahead.

MR. PEARSON: So-called professionals, what have you. Exactly.

But your Honor, with respect to the characterization of the case and what it's about and what's being sought, damages are being sought on behalf of the individual plaintiffs. Absolutely. They have their own individual claims. The class claims do focus on the unlawful practices, and the fact that no one has joined in the two years that the action has been going, things like that, these are current employees. It does take a lot of guts. It does take nerve. It does take a lot of those things to file a lawsuit against an employer, against an entity -- a powerful entity -- that you work for.

The Times has had other lawsuits against it, including a recent one that focused on race allegations along these lines. That one did not turn out to be a class-based action.

In addition, there have been diversity reports and other things that point to stagnating, declining diversity among segments of the Times's workforce. These are broad-based issues, and these are issues that would impact many people, former employees, current employees, future employees.

THE COURT: To pick up on one of your points, I've seen quite a few securities class actions in my time, often brought by a single plaintiff; a year or two can go by and not another shareholder has sought to join. I'm not familiar with

case law that says that that's a reason to deny class certification. It may be an interesting observation, but I'm not sure it's anything more than that.

MR. PEARSON: Certainly, your Honor.

The fact is that where you have a civil rights matter, where you have a focus on declaratory injunctive relief -- stop doing this practice, find some other way to pursue it. And it doesn't need to just be the buyouts, your Honor.

There are other allegations that shouldn't be allowed -- loss; the Court noted that at the beginning. Certainly this shouldn't be only about the buyouts, and it's not only about numerosity and the case law recognizes that. In cases like this one, there will be a relaxed numerosity standard. Whether it's relaxed to 35, 29, 6, that will be in the Court's discretion, but there is a relaxed standard here.

To go back to really what I think the Court was originally asking about during this portion of the proceedings, the motion to strike is not the proper mechanism. It is essentially a way for defendants to say: Great; the record is where we like it; let's file our motion now and get a decision now -- as opposed to after electronic discovery has finally been produced, as opposed to after depositions when something problematic could come out.

It is not the proper mechanism. It does stand in for a class certification motion. Numerosity, obviously, is an

important factor, and it's obviously a factor that's going to come up on -- or would come up on -- class cert, so it shouldn't substitute for that. And there is case law in the papers.

THE COURT: How about my decision? Wouldn't that be one of the cases you would cite?

MR. PEARSON: I'm sorry, your Honor?

THE COURT: On the 12(b)(6).

MR. PEARSON: Oh, with regard to the gender class?

THE COURT: No. With regard to striking the class allegations. There was an effort to do that at the 12(b)(6) stage in this case.

MR. PEARSON: Right, your Honor. This is another bite at the apple, indeed.

THE COURT: I understand that, but is it your position, then, that a defendant, faced with a class action, has no remedy other than to complete discovery and urge the court to set a prompt deadline for the plaintiff to make a class certification motion?

MR. PEARSON: No, not necessarily.

Under the cases, and the one that I suppose I would point to is *Reynolds v. LifeWatch,* it isn't the case that defendants just need to: Hey, you're locked in; you're locked into class discovery; you just have to take it and wait for that motion for certification. No, not necessarily.

Where there is an issue that is apart from the issues that we raised on class cert -- right -- or where it's on the face of the complaint -- right -- that there's some defect, and defendants tried that once already --

THE COURT: No, no, no. You're saying if the complaint doesn't state a claim for relief, then when the individual plaintiffs' claims die, so die the class claims.

MR. PEARSON: No, not necessarily.

THE COURT: OK.

MR. PEARSON: Certainly you can file a motion at the outset, whether it's to dismiss or to strike, on the face of the complaint. But you can also file if there's some separate issue that would make class cert impossible. I suppose that is the argument that defendants are making, that numerosity makes class cert impossible. However, plaintiffs' point is that no, it does not, because numerosity is one factor. And here, although again, an important one, although the first one that appears in the rule --

THE COURT: This is where I may have to pull out my rule book, but 23(a)(1) has necessary requirements. It's not, and know this, you're way too experienced not to know this.

MR. PEARSON: Prerequisite.

THE COURT: It's not something that one considers along the way. It's a prerequisite, yes.

MR. PEARSON: It is.

THE COURT: It's a necessity, not a "one of several factors that the a court takes account of."

MR. PEARSON: You certainly need more than one person, right, to make a class? But there is no strict cutoff. The case law does not say 40 people or bust. Right? And that standard gets relaxed depending upon the circumstances of the case and the relief.

THE COURT: OK.

Listen, I think both sides have done a very fine job and have been very helpful to me. I think the arguments have been presented in a reasonable, rational and understandable way by both sides, and I thank you for working hard. I know when you get an order like the order I gave you, it means you have to stop and really prepare to do the issue justice, and I think you both have done a great job in that regard.

I'm going to reserve decision.

We are adjourned.

(Adjourned)